Supreme Court, U.S.
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No. 01-1763

In the Supreme Court of the United States

CALIFORNIA INTERSCHOLASTIC FEDERATION;
CALIFORNIA INTERSCHOLASTIC FEDERATION
SOUTHERN SECTION,

Petitioners,

v.

VICTOR BARRIOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Will a settlement agreement which is judicially enforceable solely under the laws of contracts, and which agreement neither requires nor permits continuing judicial supervision over the subject of the litigation, support an award of attorney's fees to the prevailing party under 42 U.S.C. §12205 of the Americans with Disabilities Act?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners, California Interscholastic Federation and California Interscholastic Federation Southern Section, (collectively "CIF") are voluntary non-profit associations made up of public and private high schools. Petitioners have no corporate affiliations as contemplated by Rule 29.6. Petitioners were Defendants in the District Court, and are the Appellees in the Ninth Circuit Court of Appeals.

Respondent

Respondent is Victor Barrios, an individual citizen of the United States, residing in the State of California. Respondent was the Plaintiff in the District Court, and the Appellant before the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceedings ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 5

I. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With The Supreme Court's Decision In *Buckhannon Board And Care Home Inc., Et Al. v. West Virginia Department Of Health And Human Resources, Et Al.* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) 5

II. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With Other Ninth Circuit Decisions In *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001); and *Jose Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002) 7

III. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With Decisions From Other Jurisdictions 9

IV. The Question Presented Is Of Utmost Importance 11

Conclusion 12

Appendix 1a

Appendix A - Ninth Circuit Opinion Denying Petition for Rehearing - 02/27/02 . . . . . 1a

Appendix B - Ninth Circuit Opinion - 01/16/02 . . . . . 3a

Appendix C - District Court Order Denying Motion for Attorney Fees - 08/01/00 . . . . . 21a

TABLE OF AUTHORITIES

CASES

American Disability Association Inc. v. Chmielarz
2002 U.S. App. LEXIS 8064 (11 Cir.) 10

Bennett v. Yoshina,
259 F.3d 1097 (9th Cir. 2001) 7, 8, 9

Buckhannon Board and Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources,
532 U.S. 598, 121 S.Ct. 1835,
149 L.Ed.2d 855 (2001) . . . . . Passim

Fisher v. SJB-P.D., Inc., 214 F.3d 1115 (2000) 8

Johnson v. District of Columbia,
190 F.Supp.2d 34 (2002) 10

Jose Perez-Arellano v. Smith,
279 F.3d 791 (9th Cir. 2002) 7, 8, 9

New York State Federation of Taxi Drivers Inc. v. Westchester County Taxi and Limousine Commission,
1272 F.3d 154 (2nd Cir. 2001) 10

Oil Chemical and Atomic Workers International Comm. AFL-CIO, et al., v. Department of Energy,
2002 U.S.App. LEXIS 9041 (D.D.C.) 11

STATUTES

5 U.S.C.S. §522(a)(4)(E) 2

28 U.S.C. § 1254(1) 1

28 U.S.C.S. §2412(d)(1)(A) 8, 9

42 U.S.C. §§12101-12213 (1999) 1

42 U.S.C. §1988 . . . . . 2, 10

42 U.S.C. §2000e-5(k) 2

42 U.S.C. §3601 et seq 5

42 U.S.C.S. §3613(c)(2) 2

42 U.S.C.S. §12107, et seq 5

42 U.S.C. §12205 . . . . . 1, 2, 3, 4, 5

OTHER AUTHORITIES

Federal Rule of Civil Procedure §41(a)(1) 4

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Letts, D. J.) denying respondent's motion for attorney's fees is unreported and is reproduced in App. C at 21a-30a. The decision of the Court of Appeals reversing the order of the District Court is reported at 277 F.3d 1128 (9th Cir. 2002), and is reproduced in App. B at 3a-20a. The decision of the Court of Appeals denying a timely petition for rehearing *en banc* is incorporated and reproduced in App. C at 1a-2a.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on January 16, 2002. A timely petition for rehearing and request for rehearing *en banc* was denied by that court on February 27, 2002. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Barrios' federal claim arose under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§12101-12213 (1999). The ADA, specifically 42 U.S.C. §12205, permits the prevailing party to seek an award of attorney's fees and costs.

Other statutes permitting an award of attorney's fees to the prevailing party such as the Fair Housing Amendments

Act of 1988, 42 U.S.C.S. §3613(c)(2); Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k); and the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 are also impacted by the decision of the Court of Appeals. As well, statutes permitting an award of attorney's fees to one who "substantially prevails" such as the Freedom of Information Act, 5 U.S.C.S. §522(a)(4)(E), may also be affected.

This Petition focuses on 42 U.S.C. §12205 of the ADA.

STATEMENT OF THE CASE

Victor Barrios, a wheelchair-bound assistant baseball coach at Westminister High School in Orange County, California was not permitted by umpires employed by the Orange County Baseball Officials Association ("OCBOA") to coach from the field for several games during the 1999 baseball season. Umpires were concerned that Barrios' unpadded wheelchair could be hazardous.

Barrios contacted the Petitioner, CIF, a voluntary association of public and private high schools which, among other things, promulgates rules regulating officials and coaches in its member schools' baseball programs.[1]

Although Barrios was advised, almost immediately, that CIF had determined Barrios' on-field coaching was not an undue hazard, and Barrios would be permitted to coach on the field pursuant to a variance, and although CIF's decision was communicated to OCBOA, umpires were slow to respond to the decision of CIF.

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[1] OCBOA is not affiliated with CIF.

On April 27, 1999, Barrios filed a complaint and application for temporary restraining order against CIF and OCBOA. Barrios sought money damages and broad injunctive relief under ADA statutes, including attorney's fees under 42 U.S.C. §12205.

On April 30, 1999, the parties met in the chambers of the district judge to discuss the requested application for temporary restraining order. Again CIF, through its counsel, committed to permit Barrios to coach from the field. No injunctive relief was ordered by the Court on that date, or at any other time.

Although Barrios was apparently prevented by OCBOA from on-field coaching at a baseball game which occurred just after the April 30, 1999 meeting in the Court's chambers, there were no further difficulties. Barrios has coached on the field in his unpadded wheelchair at all times since.

The Barrios litigation, however, continued. Litigation continued even after Barrios settled with OCBOA for $2,500.

In March 2000, Barrios and Petitioners agreed to a settlement which included payment of $10,000 to Victor Barrios. Incorporated into a written settlement agreement was a statement that Barrios would be permitted to continue to coach on the field absent a material change in his physical condition or his wheelchair. The issue of any party's entitlement to attorney's fees, and the amount thereof, was reserved for the court.

On April 3, 2000 Barrios filed a motion for attorney's fees.

On May 16, 2000, before ruling on the motion for attorney's fees, the District Court entered a judgment according to the terms of the written settlement agreement. CIF moved to vacate the judgment on the grounds that the parties' settlement had not contemplated a judgment. The judgment was then vacated by the Court on July 7, 2000.

On August 7, 2000, the District Court found that Barrios was the prevailing party in the litigation. Barrios' motion for attorney's fees, however, was denied in its entirety. The District Court stated that although plaintiff prevailed, what Barrios obtained was de minimus in terms of what he demanded. On August 11, 2000, there was a stipulation to dismiss the case pursuant to Federal Rule of Civil Procedure §41(a)(1).

An appeal by Barrios followed. While the appeal was pending, and after initial briefing, the Supreme Court filed its decision in *Buckhannon Board and Care Home, Inc., et al. v. West Virginia Department of Health and Human Resources* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (May 29, 2001). Barrios then sought leave to submit supplemental briefing in light of *Buckhannon*'s footnote 7 at 532 U.S. 598, 604.

Leave to augment the parties' briefs was given. Thus, the *Buckhannon* issues were fully before the Court of Appeals at the time the *Barrios* opinion was rendered.

The Ninth Circuit Court of Appeals held that a private monetary settlement which does not require judicial supervision is legally enforceable, and will support an award of attorney's fees to the prevailing party under 42 U.S.C. §12205. This represents a very narrow construction of *Buckhannon*. It bestows the benefits of the fee-shifting

provisions of 42 U.S.C. §12205 upon attorneys who obtain minor monetary payments for their clients in private settlements. At the same time, under *Buckhannon*, "catalyst" attorneys who bring about major policy changes are precluded from recovering attorneys' fees in the absence of a judgment or consent decree.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With The Supreme Court's Decision In *Buckhannon Board And Care Home Inc., Et Al. v. West Virginia Department Of Health And Human Resources, Et Al.* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

In *Buckhannon*, the issue was whether a party could be deemed to be a prevailing party for purposes of recovering attorney's fees where the party did not secure a judgment on the merits, and did not obtain a consent decree, but did achieve the desired result by serving as a catalyst to bring about a voluntary change in the defendants' conduct. *Buckhannon* held that the party could not be considered a prevailing party, and entitled to an award of attorney's fees under the Fair Housing Amendments Act of 1988, 42 U.S.C. §3601 et seq. or the American with Disabilities Act of 1990, 42 U.S.C.S. §12107, et seq. The rationale was that there was neither a judgment or a court-ordered consent decree. There was no judicially ordered change in the relationship of the parties.

The Supreme Court stated in *Buckhannon* at 532 U.S. 598, 604:

> "n7 We have subsequently characterized the Maher opinion as also allowing for an award of attorney's fees for private settlement. See *Farrar v. Hobby, supra,* at 111; *Hewitt v. Helms, supra*, at 760. But this dicta ignores that Maher only 'held that fees may be assessed . . . after a case has been settled by the entry of a consent decree.' *Evans v. Jeff D.*, 475 U.S. 717, 720, 89 L.Ed.2d 747, 106 S. Ct. 1531 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 128 L.Ed.2d 391, 114 S.Ct. 1673 (1994)."

Barrios expressly declined to apply *Buckhannon* to the instant case stating in its own footnote 5 that *Buckhannon*'s footnote 7 was dictum. However, petitioners respectfully submit that in order to reach its decision in the context of a "catalyst theory" claim, the *Buckhannon* court was required to examine what its position would be in the context of a private monetary settlement. Footnote 7 appears to be more than dictum. In *Buckhannon,* the Supreme Court made clear that even in the context of private settlements, there still must be judicial approval and/or oversight of the resolution of the case before one may be considered a prevailing party for purposes of an award of attorney's fees.

Particularly problematic is that in *Buckhannon*, the attorneys' legal skills operated as the catalyst for statutory

changes, yet attorney's fees were precluded. In Barrios, attorney's fees were allowed where the attorneys brought about no changes, and did not serve as catalysts for any change affecting the class intended to be protected. The right to recover fees was necessarily based upon the private agreement to pay $10,000.[2]

Even more problematic is the fact that the *Barrios* court expressly stated that a plaintiff prevails when he or she enters into a legally enforceable settlement agreement against the defendant. Given that virtually all settlement agreements are legally enforceable under the laws of contracts, the Ninth Circuit appears to have cancelled the effect of *Buckhannon*.

II. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With Other Ninth Circuit Decisions In *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001); and *Jose Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002).

In *Barrios*, at 277 F.3d 1128, 1135, footnote 5, the Court of Appeal averred that the Ninth Circuit had rejected the "catalyst theory" in light of *Buckhannon* in *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001).

However, a review of *Bennett v. Yoshina* discloses that while *Bennett* applied the *Buckhannon* rule to preclude an award of attorney's fees to a claimant who was a catalyst, *Bennett* did much more. The *Bennett* court construed *Buckhannon* far more broadly than did the *Barrios* court, including reiterating the requirement that there must be a

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[2] To the extent Barrios' attorneys' conduct brought about any substantive changes for Barrios, the changes were voluntary, and the lawyers were catalysts.

judicially sanctioned change in the parties' relationship in order for there to be an award of attorney's fees. *Bennett* overturned "any of our [Ninth Circuit] precedents to the contrary". (259 F.3d 1097, 1101).

The *Barrios* panel, on the other hand, recognized the holding in *Buckhannon*, but not its breadth. Indeed the Barrios panel did not give *Buckhannon's* requirement of a material alteration in the legal relationship of the parties the same meaning which was given to the phrase in *Buckhannon*. The citation to and reliance upon *Fisher v. SJB-P.D. Inc.*, (214 F.3d 1115 [9th Cir. 2000]) confirms an entirely different interpretation of the meaning of the phrase.[3]

The decision in Barrios also conflicts with the decision in *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002). *Arellano* involved a claim under the Equal Access to Justice Act (EAJA) and specifically 28 U.S.C.S. §2412(d)(1)(A).

Arellano sued the Immigration and Naturalization Services (INS) for wrongfully denying him naturalization under the EAJA. *Arellano* dismissed his case against the INS after he was granted naturalization. The EAJA provides for attorneys' fees to the prevailing party, and *Arellano* sought attorneys' fees. The request for attorneys' fees was denied by the District Court on the grounds that the INS had substantial

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[3] In *Fisher v. SJB-P.D., Inc.*, 214 F.3d 1115 (June 15, 2000), a blind restaurant patron with a service dog settled an ADA claim with the defendant under circumstances where no money was paid, but the restaurant agreed to change its policies regarding equal access to individuals with service dogs. There was neither a judgment, nor a consent decree. Petitioners submit that the *Fisher* award of attorney's fees does not withstand scrutiny under *Buckhannon*.

justification for its position. The Court of Appeals affirmed, but it affirmed on the grounds that *Arellano* was not a prevailing party under *Buckhannon*. The *Arellano* court elevated the *Buckhannon* footnote to the body of its opinion, and made clear that *Buckhannon* requires (1) an enforceable judgment on the merits, or (2) a settlement agreement enforceable through a court ordered consent decree before a claimant may be considered a prevailing party with respect to EAJA. The *Arellano* court stated:

> ". . . the Supreme Court's express rule of decision sweeps more broadly and its reasoning is persuasively applicable to an award of attorneys' fees under the EAJA."

Thus Barrios conflicts with other decisions of the Ninth Circuit.

III. The Decision Of The Ninth Circuit Court Of Appeals Conflicts With Decisions From Other Jurisdictions.

The *Buckhannon* decision, including footnote 7, invited judicial attention. In *Bennett v. Yoshina* 259 F.3d 1097, 1100 (2001) the court stated:

> "In so holding, the [*Buckhannon*] Court overturned our precedents, and the precedents of most of our sister circuits, that had allowed attorney's fees if the plaintiff's action acted as a catalyst to achieve the sought-after result."

There was surely no doubt on the part of the Supreme Court that lively debate would be generated by its holding in *Buckhannon*. In particular, debate with respect to the scope

of the decision, given footnote 7, was manifest destiny. No case, however has so narrowly construed *Buckhannon* as Barrios, and no case, save one, elevated the status of a purely private settlement to a judicially sanctioned change in the relationship.[4]

Here is a sampling of the response to *Buckhannon* from a chronological perspective:

May 29, 2001:

Buckhannon establishes that in a catalyst situation, "prevailing party" terminology in fee-shifting statutes means a party with a judgment, or a consent decree subject to judicial supervision.

Nov. 27, 2001:

New York State Federation of Taxi Drivers Inc. v. Westchester County Taxi and Limousine Commission, 1272 F.3d 154 (2nd Cir.) applies *Buckhannon* to preclude an award of attorney's fees under 42 U.S.C. §1988.

May 1, 2002:

American Disability Association Inc. v.

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[4] One District Court case from the District of Columbia, *Johnson v. District of Columbia*, 190 F.Supp.2d 34, held that a mere settlement is sufficient for an award of attorney's fees to the prevailing party. The district court relied upon *Barrios* for its decision. This is the only case fully supporting *Barrios* disclosed by Petitioners' counsel's research.

Chmielarz , 2002 U.S. App. LEXIS 8064 (11 Cir.) holds that a court's express approval, adoption and ratification of a settlement over which the court expressly retained jurisdiction to enforce its terms was the equivalent of a consent decree, and would support an award of attorney's fees to the prevailing party.

May 10, 2002:

Oil Chemical and Atomic Workers International Comm. AFL-CIO, et al., v. Department of Energy, 2002 U.S.App. LEXIS 9041 (D.D.C.) reverses the lower court's decision awarding attorney's fees to the "substantially prevailing" party under the Freedom of Information Act (FOIA) in reliance upon *Buckhannon* even through the district court endorsed a Stipulation and Order of Dismissal.

It can be seen from the above that the Barrios decision conflicts with virtually every appellate decision filed on the subject since *Buckhannon*.

IV. The Question Presented Is Of Utmost Importance

When one takes into consideration the fact that the real benefit to the public for whom the fee-shifting statutes were enacted is realized through changes in conduct, irrespective of whether those changes are the result of a catalyst or of a court order, the flaws in *Barrios* become abundantly clear. Carrying the *Buckhannon/Barrios* conflict to its logical conclusion, obtaining a voluntary change in the most egregious conduct will not result in an award of attorney's

fees under *Buckhannon*. Under *Barrios*, a minimal and private monetary settlement based upon practical considerations may result in an award of hundreds of thousands of dollars in attorney's fees. There is no judgment under either scenario. There is no consent decree under either scenario. There is no judicial supervision under either scenario. Yet, when an attorney acts as a catalyst to obtain major voluntary changes for the public, there can be no award of attorney's fees. A private monetary settlement, however, serving no one but the individual claimant, and made solely to avoid further litigation expense will support such an award.

This cannot be what Congress intended. Whether one agrees or disagrees with the rule of *Buckhannon*, the rule should be applied uniformly to both catalyst situations and private monetary settlements.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-56479
DC No. 99-4466 JSL

[Filed February 27, 2002]

Victor Barrios,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
California Interscholastic Federation;	)
California Interscholastic Federation	)
Southern Section,	)
	)
Defendants-Appellees.	)
	)

BEFORE
PREGERSON, TASHIMA,
and BERZON, Circuit Judges

ORDER

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56479

[Filed January 16, 2002]

Victor Barrios,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
California Interscholastic Federation;	)
California Interscholastic Federation	)
Southern Section,	)
	)
Defendants-Appellees.	)
	)

JUDGES:
Before Harry Pregerson, A. Wallace Tashima, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Tashima.

OPINION

Plaintiff-Appellant Victor Barrios ("Barrios") sued Defendants-Appellees California Interscholastic Federation

("CIF") and California Interscholastic Federation Southern Section ("CIFSS") for discrimination claims arising under federal and state law. After entering into a settlement agreement, Barrios moved for attorneys fees and costs as the "prevailing party."[1] The district court denied Barrios' motion. Barrios timely filed this appeal, arguing that he is entitled to reasonable attorneys' fees and costs under both federal and state law. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

I. FACTUAL BACKGROUND

Victor Barrios is an assistant baseball coach for Westminster High School, part of the Huntington Beach Union School District. Westminster High School is a member of both the CIF and CIFSS.[2] Barrios has been paraplegic since 1992. As of 1999, he had coached high school baseball from

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[1] The district court had not yet entered any judgment or order of dismissal, and thus still had jurisdiction over the case, when the attorneys' fees motion was filed.

[2] The CIF is a statewide, voluntary non-profit association, made up of 1,230 public and private high schools, which receives funding from state and local sources. Among other things, CIF promulgates rules regulating the qualifications of officials and coaches in its member schools' baseball programs. CIF is broken down into 10 geographical regions, one of which is CIFSS. CIFSS too has authority to promulgate rules for baseball games played by member schools within its jurisdiction. Unless the context otherwise requires, we use "CIF" to refer to both the "CIF" and the "CIFSS".

an athletic wheelchair for four consecutive seasons in the CIFSS league. During games, Barrios' responsibilities included acting as a first or third base coach, which required him to be in the coach's box just outside the baseline to interact with his players, and deciding when to make pitching changes, which required him periodically to visit the pitcher's mound to assess the strength, energy, and focus of his pitcher.

Barrios' athletic wheelchair was specially adapted for the rigors of sports, where it is commonplace for collisions to occur both with other wheelchairs and with able-bodied referees. According to the manufacturer of Barrios' wheelchair: "[The athletic wheelchair is] used in wheelchair basketball, hockey and other contact sports along with everyday use. Many times competing players will collide with each other. And on some occasions able-bodied referees will make contact with the chairs at high speeds. To date, no injuries have been reported as a result of wheelchair design. We have been producing wheelchairs for over 30 years." In the years that Barrios has coached high school baseball, he has never been injured nor caused an injury with his wheelchair.

At the first game of the 1999 season, on February 27, an umpire told Barrios before the game that, for his own safety, he would not be permitted to coach on the field. When Barrios protested, the umpire issued an ultimatum: either Barrios forego coaching on the field or the umpire would leave. Barrios and the other team's coach agreed to play the game without the umpire so that Barrios could fulfill his duties as an assistant coach.

On March 6, 1999, Barrios was scheduled to coach a double-header in games officiated by an umpire from the Orange County Baseball Officials Association ("OCBOA"). The umpire informed Barrios that the OCBOA would not allow him onto the field to coach runners or pitchers because his presence on the field would "slow the game down." At the next game on March 9, an OCBOA umpire again prohibited Barrios from coaching on the field.

On March 10, William R. Clark ("Clark"), the CIFSS Assistant Commissioner, wrote Kathleen Miller ("Miller"), the principal of Westminster High School. Clark informed Miller that the CIFSS would permit Barrios to coach from the field, but only if "all exterior hard surfaces of his wheelchair shall be covered with 'no less than one-half inch thick, high density, closed cell polyurethane, or an alternate material of the same minimum thickness and similar properties.'" The language quoted by Clark came from a rule in the National Federation Football Rulebook that pertained to the padding of hard surfaces of football players' equipment. Clark further suggested that "this letter be kept with coach Barrios to present to any officials challenging his status."

At the next game, on March 19, an OCBOA umpire asked Barrios if he had complied with the letter sent by Clark. Barrios replied that he had neither obtained the padding nor brought Clark's permission letter. While the umpire allowed Barrios to coach the game,[3] he warned Barrios that other

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[3] Barrios speculates that the umpire allowed him to coach the March 19 game only because of media presence.

OCBOA umpires would not allow him onto the field without compliance with Clark's letter. In fact, OCBOA umpires subsequently excluded Barrios from on-field coaching in a game held on March 30.

Barrios sought legal assistance from Laura Diamond ("Diamond"), an attorney with the Center for Law in the Public Interest. Diamond contacted Clark on April 5, 1999, in an effort to resolve the situation. Clark responded to Diamond on April 6, reiterating the "need to have any hard surfaces padded" and asserting that the head umpire has authority to require such padding. After Clark's response, Barrios was, once more, on April 14, excluded by OCBOA umpires from coaching a game.

On April 20, Jilana Miller ("Miller") from the Center for Law in the Public Interest, and Christopher Knauf ("Knauf") from the Western Law Center for Disability Rights sent a letter to the CIF, the CIFSS, and the OCBOA. In this letter, Miller and Knauf alleged discrimination against Barrios, demanded that certain immediate conditions be satisfied to prevent litigation,[4] and warned that if Barrios was

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[4] Miller and Knauf, on Barrios' behalf, demanded that: (1) Barrios be permitted to coach on-field without the need of any permission letter or wheelchair modification; (2) the CIF, CIFSS, and OCBOA notify their member schools that coaches in wheelchairs are entitled to equal access; (3) the CIF, CIFSS, and OCBOA issue a written apology to Barrios; (4) the CIF, CIFSS, and OCBOA compensate Barrios in the amount of $ 25,000 for the discrimination, humiliation, and emotional distress that he had suffered on account of their discrimination; and (5) the CIF, CIFSS, and OCBOA pay $ 2,500 in attorneys' fees and costs.

excluded from coaching in the upcoming April 23 game, "we will enforce Mr. Barrios' rights under the law."

On April 21, Diamond discussed Barrios' situation with Andrew Patterson ("Patterson"), legal counsel for the CIF. In a letter dated April 22, Patterson acknowledged that Barrios "is not a safety hazard," suggested that "there has been a glitch with the umpires with respect to the presence of Mr. Barrios wheelchair on the field of play," and promised that he would obtain a "variance" from the National Federation to permit Barrios' coaching presence on the baseball field. No details were offered regarding the scope of such a variance or when it would be forthcoming.

Despite Patterson's assurances, however, Barrios was again excluded from on-field coaching on April 23. Later that day, Knauf both faxed a letter and left messages at Clark's office, informing him of Barrios' intent to file a complaint and seek a temporary restraining order against the CIF, CIFSS, and OCBOA on April 26. Barrios, in fact, filed his complaint and application for a temporary restraining order on April 27, 1999.

On April 28, Barrios again was excluded from coaching his high school baseball team.

On April 29, Patterson spoke with Miller, informing her that the CIF had granted Barrios a variance to coach his team on the playing field and that the OCBOA would be informed of this variance. In an effort to memorialize this

agreement in writing, Miller drafted, signed, and sent Patterson a stipulation whereby Barrios would "withdraw the . . . application for a Temporary Restraining Order" if the CIF, CIFSS, and OCBOA agreed to "allow Plaintiff to coach from the field, without condition, effectively immediately, until the last game of the season . . . ." Patterson refused to sign this stipulation, and the hearing scheduled for April 30 went forward.

The parties met with the court in chambers on April 30, where Patterson agreed orally that Barrios should be allowed to coach on the field for the remainder of the season. In light of this commitment, the court declined to rule on the application for a temporary restraining order. Again Barrios' counsel sought to memorialize this commitment via a written stipulation, again Patterson refused to sign the proffered stipulation, and again Barrios was excluded, at the next game following the meeting with the court, from coaching his baseball team despite Patterson's in-chambers oral commitment.

Patterson sent letters to Miller, on May 13 and June 10, 1999, informing her that Barrios had been granted a variance and expressing his frustration over (what he viewed to be) unnecessary litigation. Patterson, however, remained unwilling to sign a written stipulation regarding Barrios' variance. On June 4, Miller responded to Patterson's concerns, explaining that Barrios' recurrent exclusion, in the face of purported "variances," made legal action necessary.

On July 12, Barrios' counsel sent a lengthy proposed settlement agreement to the CIF's counsel. Defense counsel responded to this proposal on August 11, outlining their

concerns. On August 12, the CIF's counsel requested (with the agreement of Barrios' counsel) an extension to September 10, 1999, to file a responsive pleading "in order for us to continue to explore the possibility of reaching a settlement agreement."

Over the next few months, the dialogue between the parties continued, finally culminating in a settlement agreement. The agreement provided that Barrios "shall continue to be allowed to coach baseball on the field, absent a material change in his ability to coach or in his wheelchair." Barrios also was to receive $10,000 in compensatory damages. The agreement further provided that "the PARTIES agree that the issue of whether any PARTY is the prevailing party and whether any PARTY is entitled to attorneys' fees, and, if so, the amount thereof, is expressly reserved for the Court to decide upon motion by any PARTY." On April 3, 2000, Barrios filed a motion for attorneys' fees and costs.

On May 16, 2000, the district court entered a judgment and order according to the terms of the settlement agreement. Approximately two months after the parties executed the settlement agreement and one month after the district court entered the judgment, the CIF moved to vacate the judgment on the ground that the parties never discussed during the settlement negotiations whether a judgment or stipulation for dismissal would be filed. The CIF argued that the district court should vacate the judgment because otherwise Barrios would be given the opportunity to execute a judgment not contemplated by any of the parties during the settlement negotiations. In his opposition to the CIF's motion, Barrios conceded that the settlement did not address whether a judgment or stipulation for dismissal would be filed, but

argued that a judgment according to the terms of the settlement was necessary because the CIF still had not paid Barrios the $ 10,000 in compensatory damages. The CIF's motion was granted on June 21, and an order vacating the May judgment was entered on July 7, 2000.

On August 2, 2000, the district court entered an order denying Barrios' motion for attorneys' fees. On August 11, the parties stipulated to a dismissal with prejudice. The stipulation makes no mention of the issue of attorneys' fees. Barrios timely appeals.

II. STANDARD OF REVIEW

We review a district court's decision to deny attorneys' fees for an abuse of discretion. *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293-94 (9th Cir. 2001). A trial court abuses its discretion if its ruling on a fee motion is based on an inaccurate view of the law or a clearly erroneous finding of fact. *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997). Any elements of legal analysis and statutory interpretation that figure in the district court's attorneys' fees decision are reviewed de novo. *Webb v. Ada County, Ida.*, 195 F.3d 524, 526 (9th Cir. 1999). Factual findings underlying the district court's decision are reviewed for clear error. *Id.*

III. DISCUSSION

Barrios' complaint alleged violations of federal and California law. After entering into a settlement agreement with the CIF, Barrios moved for reasonable attorneys' fees and costs. The district court first determined that Barrios was

a "prevailing party" because he had both achieved some aspect of the benefit sought in bringing the suit and obtained an enforceable right to money damages. The district court further concluded, however, that Barrios' victory was at best de minimis and thus undeserving of attorneys' fees and costs. This conclusion constitutes legal error under federal and California law.

A. The Right to Fees and Costs Under Federal Law

Barrios' federal claim arose under the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213 (1999). The ADA, specifically 42 U.S.C. § 12205, permits the "prevailing party" to seek attorneys' fees and costs. The Supreme Court has held that a prevailing plaintiff under a statute so worded "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1976) (citation and internal quotation marks omitted).

The first question to be resolved, then, is whether Barrios is a "prevailing party" under the terms of the ADA. The district court's conclusion that Barrios was a "prevailing party," is correct. Under applicable Ninth Circuit law, a plaintiff "prevails" when he or she enters into a legally enforceable settlement agreement against the defendant:

> "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." The Court

> explained that "a material alteration of the legal relationship occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." In these situations, the legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.

Fischer v. SJB-P.D. Inc., 214 F.3d 1115, 1118 (9th Cir. 2000) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992)).

Here, the settlement agreement prohibits the CIF from excluding Barrios from on-field coaching of baseball games, and requires it to pay Barrios $10,000 in damages. Given that Barrios can enforce the terms of the settlement agreement against the CIF, the district court correctly concluded that Barrios was the "prevailing party" in his civil rights litigation.[5]

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[5] This conclusion is unaffected by the Supreme Court's recent decision in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001). In Buckhannon, the Court held that a plaintiff who brought an ADA action could not obtain prevailing party status for the purpose of being awarded attorneys' fees when the West Virginia state legislature eliminated the statutes being challenged in the litigation. 121 S. Ct. at 1843. The Court concluded that the "catalyst theory"--whereby a party is considered prevailing so long as he or she can prove that the pending litigation was a catalyst that brought about the policy change--is not a permissible basis for the award of attorneys' fees. 121 S. Ct. at

The district court, however, erred in concluding that, despite Barrios' status as a "prevailing party, "he nonetheless was not entitled to reasonable attorneys' fees and costs. The Court in Farrar recognized that in limited situations "'a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status.'" 506 U.S. at 113 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989)); *see also* 506 U.S. at 115 ("In some circumstances, even a plaintiff who formally 'prevails' . . . should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party."); *Tex. State Teachers*, 489 U.S. at 792 ("Where the plaintiff's success on a legal claim can be characterized as purely technical or de

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1840. In light of Buckhannon, this court too has rejected the "catalyst theory." *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001) (recognizing Buckhannon's invalidation of the catalyst theory, and corresponding Ninth Circuit precedent).

Barrios, however, does not claim to be a "prevailing party" simply by virtue of his being a catalyst of policy change; rather, his settlement agreement affords him a legally enforceable instrument, which under Fischer, makes him a "prevailing party." While dictum in Buckhannon suggests that a plaintiff "prevails" only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree, 121 S. Ct. at 1840 n. 7, we are not bound by that dictum, particularly when it runs contrary to this court's holding in Fischer, by which we are bound. Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs.

minimis a district court would be justified in concluding that [denial of attorneys' fees is appropriate].").

The district court concluded that Barrios' victory was merely de minimis, and thus undeserving of reasonable attorneys' fees and costs. According to the district court: "Contrary to plaintiff's arguments, no broad policy changes were achieved. The relief plaintiff sought for himself already had been granted prior to the filing of his complaint and was not brought about as a result of the litigation." Furthermore, the district court highlighted Barrios' original complaint, which sought "compensatory damages, statutory damages, treble damages, and punitive damages," impliedly framing the $ 10,000 settlement as comparatively small. These findings are clearly erroneous as a matter of federal law.

First, the monetary damages received by Barrios alone disqualify his settlement from being characterized as de minimis. In the original settlement offer, tendered by Barrios' counsel on April 20, 1999, Barrios sought damages in the amount of $ 25,000. The district court's classification of Barrios' settlement award of $ 10,000 as de minimis cannot be reconciled with applicable Ninth Circuit law. In *Morales v. City of San Rafael, 96 F.3d 359 (9th Cir. 1996),* for example, the plaintiff was awarded $ 17,500 in compensatory damages. As a matter of law, Morales held that this verdict was not de mimimis and was sufficient to justify an award of attorneys' fees and costs totaling nearly $ 140,000.

Second, in addition to monetary damages, the legally enforceable policy change memorialized in the settlement agreement significantly alters the legal relationship between Barrios and the CIF, and for this reason alone, also

disqualifies the settlement from being characterized as merely de mimimis. Finally, the district court's finding that "the relief plaintiff sought for himself already had been granted prior to the filing of his complaint" is clearly erroneous. On at least two separate occasions prior to the initiation of litigation, Patterson assured Barrios that a variance either was being sought or had been granted. After both assurances, however, Barrios was nonetheless prohibited from coaching his team. In light of these repeated "glitches," where Patterson said one thing, but the umpires did another, it was reasonable for Barrios to have insisted on a formal legal agreement entitling him to coach on the field. The district court's finding that Barrios had been granted relief prior to initiation of the law suit finds no support in the record.

Barrios had been subjected to discrimination on account of policies in effect prior to the initiation of litigation. Despite telling Barrios that he had been granted a "variance," the CIF refused to sign a legally binding agreement, and the discrimination continued. Only with the settlement agreement did Barrios obtain a legally enforceable right that ensured that promises made by the CIF effectively translated into nondiscrimination on the baseball diamond and in the coaching box.

In concluding that the settlement was de mimimis, the district court relied heavily on Barrios' efforts to exact "broad . . . 'policy changes.'" This reliance, however, is misplaced. The CIF never once offered a monetary settlement until finally offering the settlement agreement that brought this litigation to a close. On April 20, 1999, before filing the complaint, Barrios demanded $ 25,000 in damages to settle the matter. While the CIF continued to assure Barrios that he

could coach, they never agreed (prior to the settlement agreement) either to put that assurance in writing or to compensate Barrios with money damages. And while Barrios did, in the interim, propose "broad . . . 'policy changes,'" the fact that Barrios accepted the first settlement offering both money damages and an enforceable right to on-field coaching confirms only that Barrios acted reasonably in bringing this litigation to an expeditious end.

Furthermore, while Barrios did, during settlement negotiations, seek relief far broader than what he eventually received in the settlement agreement, this fact alone does not render de minimis the monetary award and policy change that he did in fact ultimately receive. *See Hensley*, 461 U.S. at 431 ("It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law . . . upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended . . . .") (quoting an *Davis v. County of Los Angeles*, 1974 U.S. Dist. LEXIS 8204, 8 E.P.D. P 9444 at 5049 (C.D. Cal. 1974) (internal quotation marks omitted)).

B. The Right to Fees and Costs Under California Law

Barrios state law claims arose under the California Unruh Act, Cal. Civ. Code § 51-52 (1995), and the California Disabled Persons Act, Cal. Civ. Code § 54-55 (1995).[6]

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[6] The CIF argues that the district court did not have jurisdiction over the state law claims because Barrios did not file an

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administrative claim, which it contends is a prerequisite to filing his complaint in federal court. Under the California Tort Claims Act, "no suit for money or damages may be brought against a [local] public entity . . . until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board . . . ." Cal. Gov't Code § 945.4. A "local public entity "is defined as "a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State . . . ." Cal. Gov't Code § 900.4. The only category under which the CIF could conceivably fit is "public agency." The CIF, however, has not developed this argument and there is nothing in the record to indicate that, even assuming it is a public agency, it has complied with the requirements of Cal. Gov't Code § 53051(a) & (b) so as to qualify it to be listed on the California Secretary of State's "Roster of Public Agencies." *See* Cal. Gov't Code § 53051(c). If a public agency fails to comply with the requirements of § 53051, "the failure to present a claim does not constitute a bar or defense to the maintenance of a suit against such public agency . . . ." Cal. Gov't Code § 946.4(a). Unlike a city or county, it is not self-evident that the CIF is a public entity and, on this record, the CIF has failed to show that it is a qualified public agency. Moreover, the CIF has cited no case, and we have been unable to find any, which holds, or even suggests, that a voluntary, non-profit association, made up of both public and private members, is a" local public entity" within the meaning of the California Tort Claims Act, and we decline to so hold.

Because we conclude that the claim filing requirements of the California Tort Claims Act do not apply in this case, we need not reach Barrios' alternative argument that, by entering into the settlement agreement, the CIF has waived any otherwise applicable claim filing requirement. *Cf. Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995) (suggesting that claim filing

Because we conclude that Barrios is entitled to attorneys' fees under § 55 of the Disabled Persons Act, we need not explore the other possible bases suggested by Barrios for an award of fees under state law. Section 55 authorizes private injunctive relief for violations of the Act, and also provides that "the prevailing party in the action shall be entitled to recover reasonable attorney's fees." Cal. Civ. Code § 55 (emphasis added). Unlike the Unruh Act, which the CIF argues requires a finding of liability before attorneys' fees can be awarded, *see Daviton v. Columbia HCA Healthcare Corp.*, 241 F.3d 1131, 1135 n. 5 (9th Cir. 2001) (en banc) (noting that the Unruh Act provides for attorneys' fees "upon a finding of liability"), § 55 does not require, as a prerequisite to an award of attorneys' fees, that there be a judgment of liability.

"Moreover, a plaintiff will be considered a prevailing party where the lawsuit was the catalyst motivating the defendants to modify their behavior or the plaintiff achieved the primary relief sought." *Donald v. Café Royale, Inc.*, 218 Cal. App. 3d 168, 266 Cal.Rptr. 804, 814 (Ct. App. 1990) (citation omitted). Here, Barrios' lawsuit certainly "motivated" the CIF to modify its behavior; Barrios also achieved the "primary relief sought," namely, money damages and the right to continue with his onfield baseball coaching. Barrios is thus entitled to an award of reasonable

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requirement can be waived if the public entity "waited too long to assert the ground for dismissal"); *Isaacson v. City of Oakland*, 263 Cal. App. 2d 414, 69 Cal.Rptr. 379, 382 (Ct. App. 1968) (recognizing that a public entity may waive the statute of limitations, but holding that "the evidence adequately supports the court's finding" of no waiver).

attorneys' fees under state law, as well as under federal law.

IV. CONCLUSION

For the foregoing reasons, we hold that the district court erred in concluding that the benefits Barrios obtained in the settlement agreement were de minimis. The order of the district court denying attorneys' fees to Barrios is therefore,

REVERSED and REMANDED for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 99-4466 JSL

[Filed August 1, 2000]

Victor Barrios,	)
	)
Plaintiff,	)
	)
v.	)
	)
California Interscholastic Federation, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS

Before the court is the motion of counsel for plaintiff Victor Barrios to recover attorneys' fees in the amount of $142,853.55 and costs in the amount of $7,228.13 from defendants California Interscholastic Federation ("CIF") and California Interscholastic Federation - Southern Section

("CIFSS").[1]

Having reviewed the papers filed in connection with this matter and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion of counsel for plaintiff Victor Barrios for attorneys' fees and costs be DENIED.

BACKGROUND

Plaintiff, who is confined to a wheelchair, is an assistant coach for a boys' high school baseball team. Plaintiff's coaching duties, which have included first or third base coach and pitching coach usually require him to coach from the field during the game Plaintiff alleges that in February 1999, during the first game of the 1999 baseball season, an umpire from the Orange County Baseball Officials

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[1] Plaintiff has settled separately with defendant Orange County Baseball Officials Association ("OCBOA"). The Consent Judgment between plaintiff and OCBOA, entered March 9, 2000, provides that OCBOA will pay plaintiff $1500 and institute particular policy changes in exchange for plaintiff's full release of all claims against OCBOA, including any claim for attorneys' fees and costs. Accordingly, the instant motion is against defendants CIF and CIFSS only and any "policy change" instituted by OCBOA as a result of this litigation is not relevant to the determination of this motion.

Association ("OCBOA")[2] informed plaintiff that, due to safety concerns posed by plaintiff's unpadded wheelchair, plaintiff could not coach from the field, but must coach from the dugout.[3] Plaintiff alleges that he was ultimately prevented from coaching from the field in eight games.

Neither CIF nor CIFSS creates the rules that the OCBOA umpires claimed to have followed in precluding plaintiff from coaching from the field. Rather, the National Federation of State High School Associations ("NFSHSA"), an organization unrelated to CIF and CIFSS, publishes the rules followed by the OCBOA umpires.

The presence on the field of a person in a wheelchair during games raised legitimate safety concerns for players and

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[2] The umpires were members of OCBOA, an unincorporated association that provides umpires for baseball games played by schools that are members of CIF/CIFSS.

[3] In barring plaintiff from the field of play, the umpires apparently were interpreting the National Federation of State High School Associations ("NFSHSA") rules prohibiting umpires from having wheelchairs on the field (Rule 10.1.7), requiring players to cover any hard or unyielding objects (Rules 10. 1. 6 and 1.5.3), requiring "non-traditional playing equipment" to be reviewed by the umpires (Rule 1.1.8), and prohibiting coaches from having any object in the coaches box other than a rule book or score book (Rule 3.3.1(i) as also prohibiting coaches from having wheelchairs on the field. The court has no record of having been provided with a complete copy of the 1998-1999 NFSHSA Rulebook by either party.

others on the field.[4] In light of the apparent purpose of the rules designed to promote safety, the court concludes for purposes hereof that a reasonable person responsible for the safety of those on the field would consider whether the presence of a wheelchair on the field posed a safety risk. The court further concludes that the application of the NFSHSA rules by the umpire to plaintiff was not unreasonable.

Once the umpire applied the safety rules to plaintiff and prohibited him from coaching from the field, plaintiff asserted that he had a right, under the Americans With Disabilities Act ("ADA") and other statutes, to a reasonable accommodation. Upon plaintiff's demand, and before making a complete assessment of what would constitute a reasonable accommodation, defendants granted a variance to plaintiff that would allow him to coach from the field.[5] The terms of the variance were the subject of some debate, but the variance that allowed plaintiff to coach from the field was in place prior to the commencement of this litigation. The court concludes, for purposes hereof, that this was a reasonable accommodation pending further consideration.

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[4] For purposes of this motion, the court has drawn conclusions regarding the facts of this case, even though the merits of the parties' claims have been mooted by settlement.

[5] At first, defendants told plaintiff that he could coach from the field if he covered the metal portions of his wheelchair with polyurethane padding. When plaintiff told defendants that such padding was not available, defendants sought and obtained a variance that allowed plaintiff to coach from the field without modification to his wheelchair.

Thereafter, the question of what the complete scope of a long term reasonable accommodation might be was considered. The issue was whether there could be any reasonable accommodation, in light of the safety concerns posed by the presence of a wheelchair on the field. Before defendants were given any opportunity to resolve this issue, but while the variance was in place, plaintiff filed this lawsuit, the litigation of which focused primarily on broad, generally applicable "policy changes," the necessity or desirability of which had not been demonstrated by defendants' conduct to date, and which would have no effect on plaintiff's individual rights since plaintiff already had been granted permission to coach from the field.

Specifically, plaintiff's Complaint contained five causes action for violations of the Americans With Disabilities Act, Section 504 of the Rehabilitation Act, the California Unruh Civil Rights Act, the California Disabled Persons Act, and the California Unfair Competition Law, and for intentional infliction of emotional distress. Along with seeking declaratory and injunctive relief to allow him to coach from the field (which already had been granted prior to the filing of the lawsuit), plaintiff also sought declaratory and injunctive relief on behalf of "otherwise qualified individuals" who might possibly be affected in the future by defendants' actions ("policy changes"). Complaint, p. 16:2-10. The relief sought was extremely broad and far reaching. For example, plaintiff sought an injunction "directing defendant to cease and refrain from implementing policies that deny individuals with disabilities full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations are offered to the non-disabled public." Complaint, p. 16:21-23. Plaintiff also sought a declaration "that defendants' policy and

practice with regard to coaches with disabilities violates the ADA" and other statutes. Complaint, p. 16:26-28. Although plaintiff did not name a specific dollar amount, plaintiff also sought, *inter alia*, compensatory damages, statutory damages, treble damages, and punitive damages. Complaint, p. 17:2-11.

From the outset of the litigation, defendants repeatedly stated that they had no intention of preventing plaintiff from coaching from the field in the future. Nevertheless, the litigation continued with plaintiff's counsel's efforts being directed almost entirely toward bringing about broad policy changes. Despite enormous amount of money spent pursuing them, none of the proposed policy changes were instituted. On the eve of trial, plaintiff dropped his demand for any policy changes and settled for $10,000 and an agreement to continue the variance previously instituted permitting plaintiff to coach from the field. The cash payment was considerably less than the prospective costs of continued defense of the case and the variance was no more than defendants were willing to do prior to the commencement of the litigation and at all other relevant times.

APPLICABLE LAW

In determining an appropriate fee award, the court must first determine whether plaintiff is the "prevailing party." *See Fischer v. SJB-P.D. Inc.*, 2000 D.A.R. 6349 (June 16, 2000). "'Plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which achieve some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 924, 433, 103 S. Ct. 1933, 1939 (1983)

(citations omitted). If a plaintiff obtains an enforceable right to any amount of money at all, he is considered the "prevailing party." *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566, 573 (1992).

If the plaintiff is determined to be the prevailing party, "the court must then calculate a reasonable fee award." *Fischer*, 2000 D.A.R. at 6350. Although usually the calculation of a reasonable fee involves calculation of a "lodestar figure," with subsequent adjustments,[6] "in cases where the civil rights plaintiff receives only limited or 'technical' success, the district court can simply award 'low fees or no fees' . . . ." *Id.* (citing *Farrar*). In determining that plaintiff is not entitled to recover fees or costs, the court has compared the relief the plaintiff originally sought in his complaint with the relief he ultimately obtained. *See Farrar*, 506 U.S. at 114; *Fischer*, 2000 D.A.R. at 6350. "Such a comparison promotes the court's 'central' responsibility to 'make the assessment of what is a reasonable fee under the circumstances of the case.'" *Farrar*, 506 U.S. at 114-115.

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[6] The determination of a reasonable fee usually involves a two-step process. First, the court would calculate the "lodestar figure," by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate. *Hensley*, 461 U.S. at 433, 103 S, Ct. at 1939. Second, the court would decide whether to adjust the lodestar figure based on an evaluation of the *Kerr* factors that are not already subsumed in the initial lodestar calculation. *Morales v. San Rafael*, 96 F. 3d 359, 363-364 (9th Cir. 1996).

ANALYSIS

Although plaintiff's lawsuit failed to bring about any of the "policy changes" he sought, he may be considered the "prevailing party" for purposes of this motion because he did receive consideration for dismissing the suit. Plaintiff's counsel, however, is not entitled to any additional fee award.

As set forth in more detail above, plaintiff's complaint sought declaratory and injunctive relief for himself and for a class of unidentified "otherwise qualified individuals" whose "rights" theoretically could be violated at some time in the future. Contrary to plaintiff's arguments, no broad policy changes were achieved. The relief plaintiff sought for himself already had been granted prior to the filing of his complaint and was not brought about as a result of the litigation. Plaintiff argues in conclusory fashion that an alleged NFSHSA "rule change" "was almost certainly a result of plaintiff's lawsuit." Reply at 6:1-4. There is no competent evidence that any rule change occurred at all, much less that such a rule change resulted from plaintiff's litigation.[7]

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[7] Plaintiff argues that the NFSHSA "deleted a rule from its Baseball Rulebook on which defendants relied in creating the policy that excluded Mr. Barrios from the field." Reply at 6. The evidence presented by plaintiff does not sustain his argument. As an initial matter, there is no evidence that defendants CIF and CIFSS "created a policy that excluded Mr. Barrios from the field." Plaintiff was excluded by the OCBOA umpires, who were, in turn, interpreting NFSHSA rules, which rules had been adopted by CIF/CIFSS, Plaintiff settled all of his claims against OCBOA, including for attorneys fees and costs, for $1500. Assuming, however, that CIF/CIFSS could be held liable for plaintiff's

Plaintiff's right to sue under the ADA is an individual right, not a class action right. Plaintiff cannot purport to represent every member of some unidentified class, none of whom have yet been injured, and use an alleged violation of his own rights as a means to discover and cure all past and potential future violations of the rights of other people similarly situated. As a result of plaintiff's unsuccessful efforts on behalf of "otherwise qualified individuals," defendants were forced to spend a great deal of time and

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exclusion from the field, the evidence cited by plaintiff is non-existent. First, plaintiff cites to the deposition transcript of William Clark, the Assistant Commissioner of the CIFSS. In the transcript, Mr. Clark speculates that NFSHSA, a non-party to this action, has deleted the term "wheelchair" from one of its rules. Mr. Clark is not sure which rule has been changed, only that it is the rule pertaining to officials (although by inference, it appears that Mr. Clark was referring to Rule 10.1.7), Mr. Clark did not produce the 2000 Rulebook, and plaintiff has not submitted it. Mr. Clark's statements that a rule change has occurred is inadmissible hearsay and speculation. Plaintiff also cites to various letters written by his own counsel, wherein counsel requests information regarding rules interpretation from the NFSHSA. These also fail to show that any policy change has occurred or that it resulted from this litigation. Plaintiff also cites to letters showing that the NFSHSA received copies of various filings in this lawsuit and, therefore, was aware of its existence. Aside from the lack of competent evidence that any rule change has occurred, this additional correspondence does not show that any such rule change resulted from this litigation. Even if it were so, however, it is not clear that defendants CIF and CIFSS would have to pay for plaintiffs' attorneys' fees merely because a non-party to this litigation was made aware of the lawsuit and decided to change one of its rules as a result.

money litigating matters which should not have been pursued and on which plaintiff ultimately did not prevail. Plaintiff now seeks to have defendants pay for the enormous bill his counsel accrued pursuing these matters.

If there is any case to which *Farrar* is properly applied, it is this one. The court is reluctant to conclude that counsel deliberately pursued baseless claims for the purpose of driving up the fees, and finds it unnecessary to do so. The case does illustrate, however, one of the basic difficulties in statutory fee shifting. Very early in this case, the ability of defendants to address and to resolve definitively plaintiff's legitimate statutory claim of his individual right to coach from the field was hindered and made nearly impossible by counsel's insistence that it be tied to relief on other claims which were without foundation. It would constitute a manifest injustice if defendants were required to pay any fees at all to plaintiff's counsel on the *de minimis* portion of this case on which he did prevail in circumstances in which defendants cannot recover any portion of their own fees expended defending against the claims on which plaintiff ultimately conceded.

Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for attorneys' fees and costs be DENIED.

IT IS SO ORDERED.

/s/ _____
J. Spencer Letts
United States District Judge

Dated: 8/1/00

Supreme Court, U.S.
FILED
AUG - 5 2002
OFFICE OF THE CLERK

(2)

No. 01-1763

IN THE

Supreme Court of the United States

CALIFORNIA INTERSCHOLASTIC FEDERATION and CALIFORNIA INTERSCHOLASTIC FEDERATION SOUTHERN SECTION,

Petitioners,

v.

VICTOR BARRIOS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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19pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
I. Statutory Provisions Involved	1
II. Statement of the Case	1
A. This Is An Inappropriate Case For Clarifying *Buckhannon*, The Only Issue For Which Certiorari Is Sought.	1
B. Petitioners Mischaracterize Facts That Are Not, In Any Event, Relevant.	3
III. There Is No Sound Basis For Granting Certiorari.	5
A. This Case Presents An Inappropriate Vehicle To Clarify *Buckhannon* Due To Its Unusual Procedural Background And Reliance On Multiple Grounds Of Recovery, Not Challenged By Petitioners.	5
B. Mr. Barrios Has Separate State Law Grounds Entitling Him To Attorneys' Fees, Which Are Not Challenged By Petitioners.	7
C. The Decision Below Raises No Important Question Meriting Supreme Court Review And Will Impact A Very Small Class Of Cases.	9

Contents

Page

D. The Decision Below Is Consistent With All Circuits That Have Considered *Buckhannon*, Including The Ninth Circuit. 10

IV. Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

American Disability Association v. Chmielarz,
289 F.3d 1315 (11th Cir. 2002) 11

Barrios v. California Interscholastic Federation,
277 F.3d 1128 (9th Cir. 2002) 11

Beaty v. BET Holdings, Inc.,
222 F.3d 607 (9th Cir. 2000) 8

Bennett v. Yoshina,
259 F.3d 1097 (9th Cir. 2001) 12

Brickwood v. U.S.,
288 F.3d 1371 (Fed. Cir. 2002) 11

Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources,
532 U.S. 598 (2001) ..... *passim*

Center for Biological Diversity v. Norton,
262 F.3d 1077 (10th Cir. 2001) 11

Chambers v. Ohio Department of Human Services,
273 F.3d 690 (6th Cir. 2001) 11

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 7

Cited Authorities

Page

Farrar v. Hobby,
506 U.S. 103 (1992) 9

Flannery v. California Highway Patrol,
61 Cal. App. 4th 629 (1998) 8

Folsom v. Butte County Association of Governments,
32 Cal. 3d 668 (1982) 8

Johnson v. ITT Aerospace/Communications, Inc.,
272 F.3d 498 (7th Cir. 2001) 11

Johnson v. Rodriguez,
260 F.3d 493 (5th Cir. 2001) 10

Labotest v. Bonta,
__ F.3d __, 2002 WL 1586904 (9th Cir. 2002) .. 12

Mangold v. California Public Utilities Commission,
67 F.3d 1470 (9th Cir. 1995) 7

New England Regional Council of Carpenters v. Kinton,
284 F.3d 9 (1st Cir. 2002) 10

New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Commission,
272 F.3d 154 (2d Cir. 2001) 10

Cited Authorities

	Page
Oil, Chemical and Atomic Workers' International Union, AFL-CIO v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002)	11
Perez-Arrellano v. Smith, 279 F.3d 791 (9th Cir. 2002)	12
Reimer v. Champion Healthcare Corporation, 258 F.3d 720 (8th Cir. 2001)	11
Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002)	10
United States v. Campbell, 291 F.3d 1169 (9th Cir. 2002)	12
Statutes and Codes:	
Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1999)	1
California's Disabled Persons Act, Cal. Civ. Code § 54 *et seq.*	1, 8
California's Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.*	1
Rehabilitation Act of 1974, 29 U.S.C. § 794	1

I. Statutory Provisions Involved

While petitioners seek review only of the appellate court's decision that Respondent Victor Barrios was entitled to fees under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1999), Mr. Barrios also brought claims under analogous federal and state anti-discrimination statutes:

- Rehabilitation Act of 1974, 29 U.S.C. § 794;
- California's Disabled Persons Act, Cal. Civ. Code § 54 *et seq.*; and
- California's Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.*

The court held that Mr. Barrios was independently entitled to fees under the federal statutes and the state statutes, over which the trial court was compelled to exercise supplemental jurisdiction. Each ruling, including the finding of supplemental jurisdiction, would have to be reversed in order to change the mandate of the opinion below. An affirmance on any one of the other issues would make any further explication of *Buckhannon* dictum.

II. Statement of the Case

A. This Is An Inappropriate Case For Clarifying *Buckhannon*, The Only Issue For Which Certiorari Is Sought.

The history of this case makes it an inappropriate vehicle to clarify or extend the Court's ruling in *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health*

and Human Resources, 532 U.S. 598 (2001). Petitioners, not surprisingly, have limited any discussion of the procedural background.

In March 2000, the parties reached a settlement agreement that required payment of $10,000 in compensatory damages to Mr. Barrios and directed that Mr. Barrios "be allowed to coach baseball on the field, absent a material change in his ability to coach or in his wheelchair." Pet., App. B at 10a. The agreement bifurcated resolution of attorneys' fees from the substantive provisions of the settlement, reserving the issue of attorneys' fees "for the court to decide upon motion by any party." *Id.* On April 3, 2000, Mr. Barrios filed his motion for attorneys' fees. *Id.*

On May 16, 2000, after the fee motion was fully briefed, but before the court ruled on the fee motion, judgment was entered. The judgment provided:

> This Court *having reviewed the settlement agreement* between plaintiff Victor Barrios and defendants CIF and CIFSS and *being fully advised of the terms of that agreement* and *good cause* appearing therefor, IT IS ORDERED, ADJUDGED AND DECREED: Judgment is entered *according to the terms of the written settlement agreement*, attached hereto as Exhibit A.

See Id., (italics added).

After Mr. Barrios' fee motion had been fully briefed and nearly a month after judgment had been entered, petitioners moved to vacate the judgment on the grounds that they had

agreed to the settlement, but not to incorporation into a judgment. *Id.* On June 22, 2000, without a hearing, the district court granted petitioners' motion to vacate the judgment, over plaintiff's objection. Mr. Barrios acknowledged that there had been no explicit agreement either way as to whether the settlement would be incorporated into a judgment. He argued, however, that incorporation was appropriate because the damages had not yet been paid to plaintiff. *Id.* He argued, also unsuccessfully, that no good cause existed for allowing petitioners' untimely motion to vacate the judgment.

On August 2, 2000, the court entered its order denying plaintiff's motion for attorneys' fees and costs. Pet., App. B at 11a. Neither the court nor petitioners argued that the ruling to vacate the judgment had any effect on the court's findings with respect to fees.

On August 11, 2000, the court entered the parties' stipulation of dismissal. *Id.* The sole issue petitioners ask this Court to review, then, is the effect of what was a wholly fortuitous form of judgment, in a case with unusual circumstances not likely to be repeated.

B. Petitioners Mischaracterize Facts That Are Not, In Any Event, Relevant.

Petitioners mischaracterize two facts in an effort to engage the Court's sympathy. First, they inaccurately assign all blame for any discrimination to the umpires association. *See, e.g.*, Pet. at 2 ("Barrios . . . was not permitted by umpires . . . to coach from the field. . . ."; "Umpires were concerned that Barrios' unpadded wheelchair could be hazardous."; "[U]mpires were slow to respond to the decision by CIF."). The court of appeal, however, ruled that petitioners actively

participated in creating, interpreting and demanding enforcement of rules placing unnecessary conditions on Mr. Barrios, which operated to exclude him from coaching:

> On March 10, William R. Clark ("Clark"), *the CIFSS Assistant Commissioner*, wrote Kathleen Miller ("Miller"), the Principal of Westminster High School. *Clark* informed Miller that *the CIFSS* would permit Barrios to coach from the field, but only if "all exterior hard surfaces of his wheelchair shall be covered with 'no less than one-half inch thick, high density, closed cell polyurethane, or an alternate material of the same minimum thickness and similar properties.'" *The language quoted by Clark* came from a rule in the National Federation Football Yearbook that pertains to the padding of hard surfaces of football players' equipment. *Clark further suggested* that "this letter be kept with Coach Barrios to present to any officials challenging his status."

Pet., App. B at 6a (italics added).

Petitioners next erroneously state that they "voluntarily" complied with Mr. Barrios' request to return to coaching without unnecessary, restrictive conditions. This clumsy effort to portray this as a "catalyst" case is unavailing because, as the court of appeal held, petitioners did not, in fact, comply with anything until a written settlement was achieved:

> [T]he district court's finding that "the relief plaintiff sought for himself already had been granted prior to the filing of his complaint" is clearly erroneous. . . . Barrios had been subjected

> to discrimination on account of policies in effect prior to the initiation of litigation. Despite telling Barrios that he had been granted a "variance," the CIF refused to sign a legally binding agreement, and the discrimination continued. Only with a settlement agreement did Barrios obtain a legally enforceable right that ensured that promises made by the CIF effectively translated into nondiscrimination on the baseball diamond and in the coaching box.[1]

Pet., App. B at 16a.

Petitioners' misrepresentation of the facts cannot be credited. In any event, this is not a court of error, and petitioners are not seeking review on these issues.

III. There Is No Sound Basis For Granting Certiorari.

A. This Case Presents An Inappropriate Vehicle To Clarify *Buckhannon* Due To Its Unusual Procedural Background And Reliance On Multiple Grounds Of Recovery, Not Challenged By Petitioners.

The decision below does not lend itself to extending or clarifying the holding in *Buckhannon*.

When Mr. Barrios' fee motion was pending, there was in fact a judgment incorporating the terms of the settlement

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1. The record amply supports, and petitioners do not challenge, the appellate court's ruling that the district court's findings were "clearly erroneous."

agreement. Pet., App. B at 10a. It was only after an untimely motion to vacate the judgment was granted that the trial court ruled on the fee motion, and it neither discussed nor requested authority on the effect of what may have, in the interim, become an out-of-court settlement. Indeed, at the time of the fee ruling, what form the final order might take was an open question. It was the concern that a district court might not have reviewed the merits of a settlement that lay at the core of *Buckhannon*'s suggestion that the finding that a party was "prevailing" might not be suitable where an out-of-court settlement is reached. *Buckhannon*, 532 U.S. at 604 n.7. Here, there was no such danger because the court had previously reviewed and approved the settlement agreement, and vacated the judgment for reasons unrelated to the merits.

Moreover, the ruling vacating the judgment could have been, if the potential effect had been known, the subject of a motion to reconsider and, if denied, raised on appeal. At that time, however, vacating the judgment had no impact on the question of attorneys' fees, *see Buckhannon*, 532 U.S. at 603 and n.5, making an appeal of the ruling irrelevant or even frivolous. It is possible that the district court would have ruled differently had it known the effect of vacating the judgment would be to deny the possibility of a fee on grounds neither party nor the court contemplated. To not do so would have raised serious questions of equity.

Each of these circumstances make this case an inappropriate vehicle for a clear and broadly applicable Supreme Court opinion on fee awards. If there were agreement among a majority of the Court to extend the *Buckhannon* rationale to out-of-court settlements, it should be addressed in a case where, consistent with the purported rationale for such a change, the trial court has not intimately

reviewed the settlement and where the parties have briefed and addressed the relevant legal questions from the beginning. This is not such a case.

B. Mr. Barrios Has Separate State Law Grounds Entitling Him To Attorneys' Fees, Which Are Not Challenged By Petitioners.

Equally problematic, in terms of granting certiorari, is the fact that the attorneys' fees were awarded pursuant to state statutes as well as the federal statutes discussed in *Buckhannon*.

In addition to its analysis of Mr. Barrios' entitlement to attorneys' fees under his federal claims (Pet., App. B at 11a-17a), the appellate court ruled that Mr. Barrios was entitled to attorneys' fees under his supplemental state claims. Pet., App. B at 17a-20a. Even if this Court were to rule that *Buckhannon* precluded an award of fees under the federal statutes in this case, it would not preclude an award of attorneys' fees under California statutes and, therefore, not change the result.

The federal courts look to California law to determine entitlement to fees under California statutes. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Mangold v. California Public Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995) ("In construing a state law, we follow the decisions of the state's highest court."). California courts have repeatedly held that California fee-shifting statutes do not automatically apply federal attorneys' fees jurisprudence, but make an independent determination of California law:

> [O]ur high court has made clear that federal law construing comparable [fee-shifting] statutes is

> not controlling. . . . "Federal decisions rest in part on evidence of congressional intent . . . for which there is no California parallel. *We envision an independent state rule.*"

Flannery v. California Highway Patrol, 61 Cal.App.4th 629, 632, 640 (1998) (quoting *Serrano v. Unruh*, 32 Cal.3d 621, 625 n.6 (1982)) (emphasis and second ellipsis in *Flannery*); *see also Beaty v. BET Holdings, Inc.*, 222 F.3d 607, 611 n.1 (9th Cir. 2000) ("California's law of attorney's fee awards under the FEHA has diverged from federal law as developed under civil rights fee-shifting statutes.").

Applying California law, the appellate court ruled that Mr. Barrios is entitled to fees under his state claims.[2] Pet. at 17a-20a. The California Supreme Court has long held that a plaintiff may "prevail" when he obtains a legally enforceable settlement agreement. *See Folsom v. Butte County Assn. of Governments*, 32 Cal.3d 668, 685-86 (1982).

There has been no determination by the California courts, and indeed, no suggestion, that California would extend the holding of *Buckhannon* to out-of-court settlements, even if it were to find it persuasive with respect to the catalyst theory — itself improbable. Thus, the decision below that Mr. Barrios was entitled to attorneys' fees is independently supported by application of state law.

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2. Because the appellate court concluded that Mr. Barrios was entitled to attorneys' fees under California Civil Code section 55, it did not reach the question of entitlement to fees under Mr. Barrios' other state statutory claims (Pet., App. B at 19a), leaving open additional questions that make this case an inappropriate vehicle for the Court's review.

The presence of state law grounds under supplemental jurisdiction — a question not raised by petitioners in their writ — is yet another reason this would be an inappropriate vehicle to clarify or extend *Buckhannon*.

C. The Decision Below Raises No Important Question Meriting Supreme Court Review And Will Impact A Very Small Class Of Cases.

Petitioners strain to present an "important question." They urge this Court to rectify an alleged "inconsistency" between the unavailability of fees in a catalyst case where "broad policy change" may be achieved and the availability of fees in a case with an enforceable "minimal" private settlement agreement. Pet. at 11-12.

This is a false inconsistency. A catalyst case may involve "minor" results and a private settlement agreement may involve "major" changes benefiting the public. More importantly, this issue was long ago resolved by the Court in *Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992) (holding that prevailing party who achieves nominal or *de minimis* victory may not be entitled to fees). The petition presents no important question.

Because of the unique procedural history, the court of appeal's opinion below will be very limited in its application to future cases. The circumstances that arose in this case — a settlement agreement first incorporated in a judgment, then taken out by an untimely motion, where neither the court nor the parties addressed the concerns raised in *Buckhannon* — is unlikely to recur.

The bifurcation of fee issues and merits is also comparatively rare, and presents issues that are not present when the district court has not overseen any aspect of the settlement process and may not have jurisdiction to enforce the agreement.

The small class of cases affected by a ruling in this matter does not warrant review by an overburdened Court.

D. The Decision Below Is Consistent With All Circuits That Have Considered *Buckhannon*, Including The Ninth Circuit.

Petitioners seek, unsuccessfully, to portray a circuit split between the case below and other cases that have applied *Buckhannon*. This is not the case. All circuits (including the Ninth Circuit) that have been presented with the issue have held that *Buckhannon* overruled the catalyst theory for recovering attorneys' fees under federal fee-shifting statutes. *See, e.g., New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (acknowledging that plaintiff's fee motion based on the catalyst theory was "thwarted" when the Supreme Court "recently consigned the catalyst theory to the scrap heap."); *New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi and Limousine Commission*, 272 F.3d 154, 158 (2d Cir. 2001) ("the Court concluded that the 'catalyst theory' was not a permissible basis for the award of attorney's fees"); *Smyth v. Rivero*, 282 F.3d 268, 275 (4th Cir. 2002) ("the Supreme Court specifically rejected the 'catalyst theory'"); *Johnson v. Rodriguez*, 260 F.3d 493, 495 (5th Cir. 2001) ("The Supreme Court has since rejected reliance on the 'catalyst theory' as a basis for awarding attorney's fees under fee-shifting statutes authorizing awards to the 'prevailing

party.'"); *Chambers v. Ohio Dep't of Human Services*, 273 F.3d 690, 692 (6th Cir. 2001) ("the Court categorically rejected the catalyst theory as a permissible basis for awarding attorney's fees."); *Johnson v. ITT Aerospace/ Communications, Inc.*, 272 F.3d 498, 500 (7th Cir. 2001) ("The Supreme Court has rejected the 'catalyst' ground for obtaining attorneys' fees under feeshifting provisions, such as that of Title VII, that limit the award of fees to a 'prevailing party' in the litigation."); *Reimer v. Champion Healthcare Corporation*, 258 F.3d 720, 727 (8th Cir. 2001) ("In *Buckhannon*, the Supreme Court reversed an award of attorney's fees under the catalyst theory. . . ."); *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) ("[In *Buckhannon*,] the Court concluded that the 'catalyst theory' — whereby a party is considered prevailing so long as he or she can prove that the pending litigation was a catalyst that brought about the policy change — is not a permissible basis for the award of attorneys' fees."); *Center for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 n.2 (10th Cir. 2001) ("the Supreme Court recently held that the catalyst theory cannot be invoked to support an award of attorneys' fees"); *American Disability Association v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) ("The Court invalidated the 'catalyst theory' because '[i]t allows an award where there is no judicially sanctioned change in the legal relationship of the parties.'"); *Oil, Chemical and Atomic Workers' International Union, AFL-CIO v. Department of Energy*, 288 F.3d 452, 454 (D.C. Cir. 2002) ("in *Buckhannon*, the Supreme Court rejected the 'catalyst theory'"); *Brickwood v. U.S.*, 288 F.3d 1371, 1376 (Fed. Cir. 2002) ("In *Buckhannon*, the Supreme Court rejected the use of the 'catalyst theory' in construing whether one is a 'prevailing party' under federal fee-shifting statutes such as the FHAA and the ADA.").

Despite this lengthy list of cases, petitioners cite only three cases that applied *Buckhannon*, without discussing their holdings. Pet. at 10-11. They simply allege, without support, that the opinion below "conflicts with virtually every appellate decision filed on the subject." Pet. at 11. The reality is, its central holding is consistent with all circuits that have applied *Buckhannon*. There is no split.

Contrary to petitioners' suggestion, the Ninth Circuit has consistently applied the decision in *Buckhannon*. *See Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001) (denying plaintiffs attorneys' fees under the catalyst theory); *Perez-Arrellano v. Smith*, 279 F.3d 791, 795 (9th Cir. 2002) (holding that *Buckhannon* precluded fee award under Equal Access to Justice Act, after INS voluntarily granted naturalization and case was dismissed); *United States v. Campbell*, 291 F.3d 1169, 1172 (9th Cir. 2002) (extending *Buckhannon* to "The Hyde Amendment," 18 U.S.C. § 3006A, and denying attorney's fees); *Labotest v. Bonta*, __ F.3d __, 2002 WL 1586904 (9th Cir. 2002) (finding fee award was appropriate under *Buckhannon* where stipulation granting plaintiff relief was incorporated into the court's final order, and settlement agreement was entered with approval by the court).

The Ninth Circuit has consistently followed and expanded upon *Buckhannon*.

IV. Conclusion

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-1763

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IN THE
SUPREME COURT OF THE UNITED STATES

CALIFORNIA INTERSCHOLASTIC FEDERATION;
CALIFORNIA INTERSCHOLASTIC FEDERATION,
SOUTHERN SECTION, *Petitioners,*

v.

VICTOR BARRIOS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

BRIEF AMICI CURIAE OF CALIFORNIA, ALABAMA, HAWAII, NEBRASKA, NEVADA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AND OHIO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA	2
STATEMENT OF THE CASE	3
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. The Court Should Grant Certiorari In Order to Resolve Conflicts Between CIF and Decisions of Other Circuits.	4
A. The CIF Opinion Has Created a Conflict Among the Circuits, as Well as Within The Ninth Circuit.	5
B. The CIF Opinion Completely Contradicts Buckhannon.	8
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Federal Cases	
American Disability Association v. Chmielarz 289 F.3d 1315 (11th Cir. 2002)	4
Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources 532 U.S. 598 (2001)	*passim*
California Interscholastic Federation v. Barrios 277 F.3D 1128 (9th Cir. 2002)	3-10
J.C., etc. v. Regional School District 10, etc. 278 F.3d 119 (2d Cir. 2002)	5
New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n 272 F.3d 154 (2d Cir. 2001)	6
Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Department of Energy 288 F.3d 452 (D.C. Cir. 2002)	6
Perez-Arellano v. Smith 279 F.3d 791 (9th Cir. 2002)	6-7
Smyth v. Rivero 282 F.3D 268 (4th Cir. 2002)	5
Rules of the Supreme Court	
Rule 37.4	1

IN THE

SUPREME COURT OF THE UNITED STATES

No. 01-1763

CALIFORNIA INTERSCHOLASTIC FEDERATION;
CALIFORNIA INTERSCHOLASTIC FEDERATION,
SOUTHERN SECTION, *Petitioners,*

v.

VICTOR BARRIOS, *Respondent.*

QUESTION PRESENTED

Does a purely private settlement agreement that 1) is not in the form of a consent decree, 2) is not incorporated in an order of dismissal, 3) does not require ongoing judicial supervision, and 4) merely extends jurisdiction on the district court to consider a subsequent motion for attorneys' fees, bear sufficient "judicial imprimatur" to justify conferring prevailing-party status on the plaintiff for purposes of federal fee-shifting statutes, notwithstanding Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001)?

INTEREST OF AMICI STATES

Amici curiae California, Alabama, Hawaii, Nebraska, Nevada, Commonwealth of the Northern Mariana Islands and Ohio (Amici States) respectfully file this brief in support of petitioner, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

Amici States, through their agencies and departments, are continuously engaged in litigation filed against them by private plaintiffs, who often seek an award of attorneys' fees and costs pursuant to various federal fee-shifting statutes. Fee awards that are awarded or included in settlements are paid from the States' treasuries.

In its recent decision in Buckhannon, this Court held that in order to qualify as a "prevailing party" and therefore be entitled to fees under federal fee-shifting statutes, a plaintiff who settles his action must show that the settlement bears the "imprimatur" of the court, i.e., that the relief came by and through the involvement, oversight and order of the court, not through the purely private agreement of the litigants. The plaintiff must achieve a "judicially sanctioned change in the legal relationship of the parties." Id. at 605. Thus, this Court struck down the "catalyst" theory, under which plaintiffs had been deemed prevailing parties on no other basis than that the lawsuit they filed led the defendant to voluntarily change its policies and procedures without a court order requiring it to do so. With respect to cases resolved by settlement, this Court held that a plaintiff may be deemed to be a prevailing party only if the settlement agreement is in the form of a consent decree or is incorporated in the court's order of dismissal. Id. at 604 n.7. Thus, while a state may negotiate a fee with plaintiffs, if it either declines or is unable to do so, the district court cannot issue an order requiring the state to pay the plaintiff's attorneys' fees unless the settlement bears the imprint of the court's action on the merits or requires continuing judicial enforcement of its terms.

Buckhannon is important to Amici States because it directly affects claims by litigants against the States' treasuries, and is applied and considered by the States in deciding whether and how to settle litigation against them, including and especially so-called "impact" litigation which results in changes to the States' policies and practices.

In the case at bar, California Interscholastic Federation v. Barrios, 277 F.3d 1128 (9th Cir. 2002) (hereinafter, "CIF"), however, one panel of the Ninth Circuit conferred prevailing-party status on a settling plaintiff despite the fact that the settlement was neither in the form of a consent decree nor incorporated into an order of dismissal. In so doing, the panel wrongly stated that the portion of Buckhannon imposing those requirements is mere dictum which it could, and therefore did, choose not to follow. It held instead that any private settlement agreement enforceable under the law of contracts is sufficient to render the plaintiff a prevailing party entitled to fees. That holding conflicts not only with decisions of three other Circuits that have interpreted and applied Buckhannon, but also with the decision of another panel of the Ninth Circuit itself. California and the other Amici States respectfully urge the Court to grant the petition for writ of certiorari to correct this disregard of Buckhannon, to resolve the conflict among the circuits and within the Ninth Circuit, and to clarify the law in this very important area.

STATEMENT OF THE CASE

Amici States adopt petitioner's statement of the case, with the exception of the following sentence in the last paragraph thereof: "This represents a very narrow construction of Buckhannon."

INTRODUCTION AND SUMMARY OF ARGUMENT

Certiorari is necessary in order to resolve a conflict among the circuits on an important issue of law.

The very essence of Buckhannon is that a party does not truly "prevail," and thereby become entitled to a fee award under the fee-shifting statutes, unless it obtains relief by and through the direct involvement of the court. The requisite judicial imprimatur or oversight cannot be supplied post hoc merely by including in a purely private settlement agreement a provision reserving jurisdiction in the court to decide any future motion for fees. By holding otherwise, CIF contradicts Buckhannon and creates a conflict among the circuits which this Court should resolve.

ARGUMENT

I. The Court Should Grant Certiorari in Order to Resolve Conflicts Between CIF and Decisions of Other Circuits.

The Ninth Circuit mislabeled as dictum an important ruling in Buckhannon, and explicitly chose to disregard that ruling. Unless it is reversed, CIF will eviscerate Buckhannon's holding and effect with respect to settlements. And the CIF opinion does more than conflict with Buckhannon. It has created other conflicts as well. It has created a split between the Ninth Circuit and three other circuits which have recently interpreted and applied Buckhannon in the context of settlement agreements, a conflict which the Eleventh Circuit recently noted in American Disability Association v. Chmielarz, 289 F.3d 1315, 1319 n.2 (11th Cir. 2002). The CIF decision has also created a split within the Ninth Circuit itself.

A. The CIF Opinion Has Created a Conflict Among the Circuits, as Well as Within the Ninth Circuit.

Three circuit courts of appeals have interpreted and applied Buckhannon contrary to the CIF panel. In Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002), a case which is particularly relevant to the case at bar, the Fourth Circuit reversed a fee award because the plaintiffs were not prevailing parties on the basis of a private settlement agreement. Carefully reviewing and relying on Buckhannon, the Fourth Circuit ruled that the settlement agreement was not sufficient to confer prevailing-party status because its terms were not incorporated into a court order and there was no provision retaining the court's jurisdiction to enforce its terms. Whether or not the settlement agreement was enforceable under contract law was irrelevant to this determination.

The Fourth Circuit took particular note of the fact that, in Buckhannon, this Court distinguished its rulings regarding settlements as a basis for prevailing-party status from dicta in its previous opinions which might have suggested that purely private settlements could support prevailing-party status. Smyth v. Rivero, 282 F.3d at 279. In other words, the Fourth Circuit interpreted and applied footnote 7 of Buckhannon, 532 U.S. at 604 n.7, and other statements in the opinion consistent with footnote 7, as a holding.

Likewise, in J.C., etc. v. Regional School District 10, etc., 278 F.3d 119 (2d Cir. 2002), the Second Circuit interpreted and applied Buckhannon's statements regarding settlement agreements as a holding. The Second Circuit stated that in Buckhannon, this Court "*held* that, to be a prevailing party, one must either secure a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree." Id. at 123 (emphasis added). In response to the plaintiff's argument that plaintiff had obtained a change in the legal relationship between the parties, the Second Circuit stated that, even if he had, "this change was not

judicially sanctioned, as required by Buckhannon." Id. at 125; see also New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n, 272 F.3d 154, 158-59 (2d Cir. 2001) (reversing a fee award where the parties entered into a private settlement and the district court entered an order dismissing the case as moot).

Similarly, in Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002), the D.C. Circuit reversed a fee award pursuant to Buckhannon, ruling that the plaintiff was not made a prevailing party by a settlement and subsequent court order which dismissed the case and reserved plaintiff's right to obtain a fee award. Reviewing Buckhannon, the D.C. Circuit held that the order did not constitute judicial relief to the plaintiff or any action by the court altering the legal relationship of the parties. Id. at 458.

Each of these opinions conflicts with CIF's holding that, even under Buckhannon, a plaintiff is a prevailing party as long as the settlement agreement between the parties is enforceable under contract law.

CIF even conflicts with a recent decision by another panel of the Ninth Circuit itself. In Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002), the Ninth Circuit was considering whether the holding in Buckhannon was limited to the particular federal fee-shifting statutes at issue in that case. In concluding that it does not, the court not only reiterated that the language in Buckhannon regarding settlements was a holding, but the panel itself held that in order to be a "prevailing party" under federal fee-shifting statutes, by virtue of a settlement, the settlement must result in a court-ordered consent decree: "We therefore *hold* that a 'prevailing party' under the EAJA must be one who has gained by judgment *or consent decree* a 'material alteration of the legal relationship of the parties.'" Id. at 794-95, quoting Buckhannon, 121 S.Ct. at 1840 (emphasis added).

Applying this rule to the facts before it, the Perez-Arellano panel then concluded that the plaintiff in that case was not a "prevailing party" because,

> Perez-Arellano unmistakably did not gain a change in his legal relationship with the INS by judgment *or consent decree. Under the standard set in Buckhannon*, and adopted by us as the rule of decision to interpret the term 'prevailing party' in the EAJA, Perez-Arellano does not qualify as a 'prevailing party' for purposes of an award of attorney's fees.

Id. at 795 (emphasis added).

After issuing its opinion in Perez-Arellano, the Ninth Circuit panel slightly modified it by deleting one additional acknowledgment that the portions of the Buckhannon opinion regarding settlements constitute a holding, and by making two other slight modifications which downplayed that point. One of the other changes was to add a footnote, 279 F.3d at 795 n.5, in which the court sought to harmonize its opinion with CIF. The court noted that because no settlement agreement is involved in the Perez-Arellano case, it did not need to address whether the plaintiff would have qualified for prevailing-party status under the rules pertaining to settlements. More significant than that disclaimer, however, is the fact that the Perez-Arellano panel left undisturbed all the other acknowledgments of the Buckhannon holding regarding settlements mentioned above.

Certiorari is necessary in order to resolve all the conflicts created, both within and without the Ninth Circuit, by the CIF opinion.

B. The CIF Opinion Completely Contradicts Buckhannon.

In Buckhannon, this Court held that a plaintiff does not become a "prevailing party" entitled to a fee award just because the suit acted as a "catalyst" for legislative change. In addition, in footnote 7, this Court stated that a plaintiff who is a party to a private settlement agreement does not become a "prevailing party," and thus entitled to fees under federal fee-shifting statutes, unless the settlement is in the form of a consent decree or incorporated into the court's order of dismissal. Buckhannon, 532 U.S. at 604, n.7. This Court held that a settlement cannot serve as the basis for fees unless it reflects the court's "imprimatur," i.e., the court's oversight or order.

The settlement in CIF fails to meet that requirement. It was not a consent decree and was not incorporated into the dismissal order. The district court considered and denied Barrios' motion for fees, prior to the issuance of Buckhannon. Applying the standards in effect before Buckhannon, the district court ruled that Barrios was not a prevailing party because (1) his technical victory was insignificant compared to the relief he originally sought, including broad policy changes, and (2) the relief he obtained for himself had been granted prior to the filing of the complaint and was not the result of the litigation. CIF, 277 F.3d at 1135.

The Ninth Circuit panel in CIF reversed the denial of Barrios' motion for fees. In so doing, the panel contended that footnote 7 of Buckhannon was merely dictum, and explicitly declined to follow it. Id. 277 F.3d at 1135 n.5. The panel essentially held that any private settlement agreement which is enforceable under the law of contracts will serve as a basis for prevailing-party status and thus a fee award, even without a court order incorporating the agreement or retaining jurisdiction to enforce it. It thus awarded prevailing-party status to Barrios, even though his private settlement agreement was not in the form of a consent decree, was not incorporated

into the district court's dismissal order, and did not provide for continuing judicial enforcement of its terms.

It is clear, contrary to CIF, that footnote 7 of the Buckhannon opinion is not dictum. It is part-and-parcel of this Court's holding, rationale and mandate in that case. It applies this Court's rationale that a plaintiff is not a prevailing party unless the settlement is the product of judicial action and involvement or requires judicial oversight and continuing involvement with respect to future compliance or execution of the substantive settlement terms. Nor is the CIF opinion an alternative construction of Buckhannon; it is inconsistent with it, because it would entitle a settling plaintiff to an order for attorneys' fees notwithstanding the fact that the settlement does not bear the degree of judicial involvement or oversight that this Court has stated is required for such an order to be issued.

The Ninth Circuit implicitly acknowledged this when, in a sideways nod to Buckhannon, it stated that "sufficient judicial oversight" of the settlement had been provided because the settlement agreement stated that the district court would retain jurisdiction to decide any motion for attorneys' fees which might be made later. CIF, 277 F.3d at 1134 n.5. However, it is clear from Buckhannon that this is nowhere near the kind of judicial oversight or "imprimatur" required by this Court to justify an award of attorneys' fees. That degree of judicial involvement or oversight cannot be supplied merely by reserving the right to have the court determine a fee motion based on a settlement that itself is not the product of judicial involvement or does not require continuing judicial oversight.

The Ninth Circuit's decision in CIF, therefore, does more than simply conflict with Buckhannon; it would effectively eviscerate it. If, as the CIF court held, any private settlement agreement enforceable under the law of contracts is a sufficient basis for prevailing-party status under federal fee-shifting statutes, then every private settlement will meet that test. Any valid settlement agreement is, per se, enforceable as a contract.

If CIF is not overturned, Amici States' taxpayers will be exposed to liability for the fees of plaintiffs' attorneys, even though the plaintiffs might not have obtained a judgment in their favor or a settlement in the form of a consent decree or other court order. That is clearly not the result effected or intended by this Court in Buckhannon.

Those courts that have properly followed Buckhannon understood that the opinion's application to purely private settlement agreements does not adversely affect the public interest. Private plaintiffs who bring meritorious cases, including cases that seek changes in government policies and practices, retain their ability to collect fees. In such cases, they can either negotiate a fee payment, utilizing the strength of their case as leverage, or pursue the litigation to judgment and collect fees.

Amici States recognize that there are situations in which they promote the public interest by making changes in their policies and practices, and that litigation against the States challenging those policies and practices may sometimes lead to such changes. Amici States believe, however, that responsible government entities appreciate the obligations imposed upon them under fee-shifting statutes. They will consider the equities in situations wherein plaintiffs truly serve as catalysts for change, and they will and do attempt to negotiate a fee with plaintiffs. At the same time, any negotiated fee will be tempered by the amount and degree of success or change plaintiffs have caused by litigation. Responsible government parties can best assess whether the litigation or some other factor (such as legislative pressure or other litigation) has most directly forged a change in policy or behavior. Buckhannon properly leaves that determination to the government defendant.

CONCLUSION

As this Court correctly recognized in Buckhannon, in order for the district court to award attorneys' fees against a settling defendant under federal fee-shifting statutes, the plaintiff must obtain relief against the defendant by and through the action of the court. The Ninth Circuit's decision at bar runs counter to Buckhannon insofar as settlements are concerned and has created conflicts with other Circuits. For the reasons stated above, the Amici States respectfully urge the Court to grant the petition for certiorari.

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Respectfully submitted,

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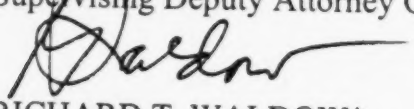

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